

Charles Macarty, the Son  
and Executor of Charles Macarty, Esq; deceased, Appellant. | John Bayly, Respondent.

# T H E A P P E L L A N T ' S C A S E.

1625. Charles Oge Macarty was, before 1641, seized in Fee of the Lands in Question, (among others) and by a Limitation in his Marriage Settlement, made in 1625, the same were to come to the Appellant's Testator, on Failure of Issue Male of the Body of the said Charles Oge Macarty.

1665. The said Lands, together with several other forfeited Estates in the Barony of Muskry in Ireland, were, by the Act of Settlement made in that Kingdom, vested in King Charles the Second; and by a Clause in the Act of Explanation, the same were to be set out and granted unto Charles James Macarty, then Lord Muskry, an Infant, in Tail Male, with Remainder in Tail Male to Donogh then Earl of Clancarty, (the said Lord Muskry's Grand-father) with a Remainder over to the right Heirs of the said Earl: *And it is expressly provided, That the said Earl Donogh, or Hellen then Countess of Clancarty, (if she survived the said Earl) should, by way of Lease, or Rent-charge for Years, or otherwise, as to him or her should seem meet, afford such Relief out of the Premisses to the former Proprietors, as he or she should find did best merit the same; and what he or she should do therein, is by the said Act made good and valid in Law.*

Page 888. The said Earl of Clancarty and the Lord Muskry dy'd soon after; and Callaghan, the second Son of Earl Donogh, became Earl of Clancarty.

1674. Charles Oge Macarty dy'd without Issue, and David Barry being his Heir General, viz. his Sister's Son, prevailed on the said Callaghan, Earl of Clancarty, to make him a Lease of Ninety Nine Years, of the Lands in Question, the Appellant's Testator being then in England. In which Lease there is a Proviso or Condition, That if it should afterwards appear that any other Person, by virtue of any Deed of Intail, or otherwise, ought to have or be intituled to the Inheritance of the Premisses, after the Death of the said Charles Oge without Issue Male of his Body, (had there been no Forfeiture of the same) then the said Lease to be void.

1675. The Appellant's Testator exhibited a Bill in the Chancery of Ireland against the said Earl Callaghan and David Barry, praying that Earl Callaghan should be decreed to make him a Lease; but the then Lord-Chancellor thought he had no such Power, and dismissed the Bill: However afterwards the said Dismissal was set aside.

1677. In Pursuance of an Order of the King and Council in England, and another Order of the Lord-Lieutenant and Council in Ireland, founded on a Report of Sir John Temple, then Sollicitor-General in Ireland, the said Countess Hellen (who alone was by the Act of Parliament authorized to make Leases of the Premisses to Meriting Persons, and to judge who they were, and of their Merit) and Countess Elizabeth, the Mother and Guardian of the then Earl of Clancarty, by Deed reciting the Proviso in the Act of Explanation, and the Settlement made in 1625, and that the Appellant's Testator was a Meriting Person, and that the Lands in Question ought to have come to him by the said Settlement in 1625, did therefore (pursuant to the Power in the said Act of Explanation, and the other Matters aforesaid) demise the Lands in Question (among others) to him for the Term of Ninety Nine Years.

For some time after the Year 1677, the Possession of the Lands in Question was disputed, the said David Barry sometimes receiving the Rents, and at other times the Appellant's Testator; but in 1686, the Appellant's Testator had quiet Possession, and continued it till the Year 1692, and then was forcibly turn'd out by the Respondent's Father, who pretended he had got an Assignment of Barry's Lease.

*Note,* That Barry judging his Lease of little Value, sold the same to one Owen Macarty for Twenty Guineas, a Horse valued Three Pound, and a Treat of Twenty Shillings.

The Inheritance of the Premisses being vested in the late Trustees for Sale of the Irish Forfeitures, by reason of the Attainder of the Earl of Clancarty, the Appellant's Testator claim'd the Benefit of his said Lease, and was Decreed thereunto, notwithstanding all the Opposition given him by the Respondent, who was an Agent for the Trustees, and one of their Receivers; and the Respondent claim'd the Benefit of Barry's Lease, and was dismiss'd on full Hearing.

1702. The Appellant's Testator brought an Ejectment, and obtain'd a Verdict and Judgment; whereupon the Respondent Exhibited a Bill in the Chancery of Ireland, pretending That Barry's Interest was come to him by mean Assignments; and in December 1705, the Lord-Chancellor decreed a perpetual Injunction to stop all Proceedings at Law upon the said Judgment in Ejectment, or otherwise, on the Appellant's Title, which Decree the Appellant hopes your Lordships will Reverse.

*Reasons for reversing the Decree.* I. For that the Determination of the Trustees was Binding and Conclusive to all Parties, the Matter being undeniably Subject to their Jurisdiction, and no Appeal lay from them to the Chancellor.

II. For that the Lord-Chancellor could not Examine, Alter, Correct or Controul what Countess Hellen had done, who was intrusted in this Particular by the Parliament; and he might as well pretend to Repeal an Act of Parliament, as Establish Bayly's Term, and set aside Mr. Macarty's Lease.

III. For that if Barry's Lease had been of any Validity, yet the same was defeated and avoided by the Condition annexed thereto, and herein before-mention'd.

**S A M . D O D D .**